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No. 772

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

FREDERICK G. DRUEDING, ET AL., *Appellants*,

v.

GERARD F. DEVLIN, ET AL., *Appellees*

On Appeal from the United States District Court for the District of Maryland

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JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants appeal from the final order dismissing the complaint, which was entered October 15, 1964, by the District Court, consisting of three judges convened pursuant to Title 28, United States Code, Section 2284, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the District Court for the District of Maryland was rendered October 23, 1964, and is reported at 234 F. Supp. 721. It is reprinted herein as Appendix B.

JURISDICTION

The jurisdiction of the District Court to decide the question involved in this appeal was invoked under the Fourteenth Amendment to the United States Constitution, Title 42, United States Code, Section 1983, and Title 28, United States Code, Sections 1343(3), 2201 and 2202. The final order of the District Court was entered on October 15, 1964, and notice of appeal was filed in that court on October 19, 1964. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b). The Court's jurisdiction to review the case on direct appeal is sustained by *Baker* v. *Carr*, 369 U.S. 186, and *Reynolds* v. *Sims*, 377 U.S. 533.

QUESTION PRESENTED

Whether provisions of the Maryland Constitution and statutes, which prohibit a resident of the State from voting in a national election for President and Vice-President of the United States if he has not resided in the State for one year and in the county or city where he offers to vote for six months, are arbitrary and discriminatory, thereby violating the Fourteenth Amendment to the Constitution of the United States.

PROVISIONS OF THE STATE CONSTITUTION AND STATUTE INVOLVED

The relevant provision of Article I, Section 1, of the Maryland Constitution, and of the State's statutes are set forth in Appendix A hereto.

STATEMENT

This is a class action brought by the appellants on behalf of themselves and others similarly situated, for the purpose of having declared unconstitutional and to enjoin enforcement of the provisions of Article I, Section 1, of the Maryland Constitution and of the statutes of that State which have the effect of prohibiting a resident from voting in a national election for President and Vice-President of the United States unless he has resided in the State for one year, and in the county or city where he offers to vote for six months.

The appellants, Frederick G. and Mona Drueding, are husband and wife, and are each over the age of 21 years. They are citizens of the United States, and have been residents of Prince George's County, Maryland, since June 6, 1964, having moved there from Pennsylvania, where they previously resided. When the appellants relinquished their residence in Pennsylvania, they lost, pursuant to the laws of that state, their eligibility to vote there.

The appellants, wishing to qualify themselves to vote in Maryland in the election scheduled for November 3, 1964, for President and Vice-President of the United States, sought on September 12, 1964, to register for the purpose of voting, with the registration officials for the precinct where they currently reside. The officials refused to permit them to register. Although the appellants then possessed all other qualifications for voting in Maryland, they were prevented from registering and thereby becoming eligible to vote in the scheduled election, because of their inability to fulfill the residence requirements of 12 months in the State and six months in Prince George's County by the date of the election.

The defendants Gerard F. Devlin, Robert L. Moran and James S. Brady, Jr., comprise the Board of Election Supervisors of Prince Georges County. The intervening defendants, J. Millard Tawes and Lloyd L. Simpkins, are respectively the Governor and Secretary of State of Maryland.

The appellants, in the District Court, sought a declaration as to the unconstitutionality of the provisions of law in question and an injunction against their enforcement. A three-judge Court, convened pursuant to Title 28 United States Code, Section 2284, heard the matter and on October 15, 1964, entered an order granting the defendants' motion to dismiss.

THE QUESTION PRESENTED IS SUBSTANTIAL

Maryland, by requiring one year's residence in the State and six months in the county or city as prerequisites to voting in presidential and vice-presidential elections, arbitrarily and without justification denies the right to vote to a substantial class of persons who are otherwise qualified to cast ballots, thereby violating the Equal Protection and Due Process clauses of the Fourteenth Amendment. The disqualification of persons from voting in presidential elections which recurs every four years as the result of enforcement by Maryland and other states of unreasonable length-of-residence requirements affects a larger class of potential voters, and presents a constitutional issue equally as grave as the issue currently before the Court for consideration in *Carrington* v. *Rash*, certiorari granted, No. 82, this Term (involving the validity of a Texas constitutional provision barring members of the Armed Forces stationed in Texas from acquiring voting residence in the county where they

are stationed if they were nonresidents of that county when they entered military service).[1]

The size of the class of persons affected by the instant litigation is indicated by the undisputed evidence before the District Court, based on current Bureau of the Census data, showing that 3.7 million adult Americans annually change residence from one state to another, and that another 3.3 million adults annually move from one county to another within the same state.[2] Further indicative of the dimensions of the issue is the fact that there are 27 states[3] in addition to Maryland which permit only persons with one year's residence in the state to vote in presidential elections. Mississippi goes further and requires *two years'* residence in the

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[1] A three-judge District Court, contrary to the Supreme Court of Texas, held the contested provision of the Texas constitution to be violative of the Fourteenth Amendment. *Mabry* v. *Davis*, 232 F. Supp. 930 (W.D. Tex.).

[2] Estimates from other sources similarly point to about 8 million potential voters who are prevented by state length-of-residence requirements from voting in national elections. Schmidhauser, *Residency Requirements for Voting and the Tensions of a Mobile Society*, 61 Mich. L. Rev. 823, 829 (1963); note, *Federal Elections—The Disenfranchising Residence Requirement*, Univ. of Ill. L. Forum 101 (Spring 1962); *Report of the President's Commission on Registration and Voting Participation* 13 (Govt' Print. Off.) (1963); see also, Kravitz, *Residence Requirements for Voting*, printed in Hearings Before Subcommittee on Constitutional Amendments of the Senate Judiciary Committee, 87th Cong., 1st Sess. 848-850 (1961).

[3] Alabama, Alaska, Arkansas, Delaware, Florida, Georgia, Hawaii, Kentucky, Louisiana, Montana, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wyoming, and the District of Columbia (Source: State constitutions and statutes)

state in order to become a qualified voter.[4] Various states in addition to Maryland also require as much as six months' residence in the locality where an individual seeks to vote as a qualification for voting for President.

Under Article II of the Federal Constitution it is within the discretion of each state legislature to determine the method of selecting the state's presidential electors, and although other methods than the popular vote may be, and have been, utilized (*McPherson* v. *Blacker*, 146 U.S. 1, 30-32), it cannot be gainsaid that if the choice of electors is entrusted to the people, the Equal Protection Clause of the Fourteenth Amendment is applicable. *Baker* v. *Carr*, 369 U.S. 186, 207-208; *Reynolds* v. *Sims*, 377 U.S. 533, 554-568; *Gray* v. *Sanders*, 372 U.S. 368.

For the purpose of choosing its representatives to the Electoral College, a state's right to limit the electorate to residents of the state is not questioned. But Maryland has gone beyond that, and has further restricted the electorate to persons who have resided in the state for one year and in a particular county or city of the state for six months. These two restrictions have no reasonable relation to the process of choosing the state's presidential electors. The candidates for President and Vice-President of the United States are national candidates who run for office on national party

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[4] In Mississippi a move from one precinct to another causes a person to lose his right to vote for one year. Miss. Const. Art. 12, sec. 241; Anno. Code of Miss., 1942 ed., Title 14, Sec. 3235; Ops. Atty. Gen. 1933-1935, p. 99. In *United States* v. *State of Mississippi*, probable jurisdiction noted, No. 73, this Term, the Court currently has under consideration related questions concerning the constitutionality of other means by which the State of Mississippi limits exercise of the franchise.

platforms. The individuals elected to these offices fulfill prescribed functions delineated under Article II of the Federal Constitution. The duties and responsibilities of the Chief Executive are of nation-wide import, and his constitutional role is to determine and execute policies on the basis of the national interest. A voter's familiarity with the contestants for the offices of President and Vice-President, and his knowledge of the principal issues relevant to casting an informed ballot have no relation to his length of residence in a particular state or locality within a state. In short, there is no rational connection between length-of-residence provisions, such as those in Maryland, and a person's competence to vote for the nation's highest elective offices. Since the disenfranchisement which the provisions effect is unreasonable and discriminatory, it falls under the proscription of the Equal Protection Clause.

Maryland's length-of-residence provisions as prerequisites to voting have been explained by the State's Court of Appeals on two grounds—that they serve: (1) "the purpose of identifying the voter, and as a protection against fraud;" and (2) to insure that the voter will "become in fact a member of the community, and as such have a common interest in all matters pertaining to its government." *Schaeffer* v. *Gilbert*, 73 Md. 66, 20 A. 434, 435.[5] Concerning the second purpose stated—that of assuring the voter's familiarity with local issues and knowledge of local candidates—this factor, as shown above, has no relevancy in presidential elections where the candidates and issues are

[5] Accord, *Howard* v. *Skinner*, 87 Md. 556, 40 A. 379, 380-381; *Hill* v. *Niblett*, 171 Md. 653; 187 A. 869, 871; *Shenton* v. *Abbott*, 178 Md. 526, 15 A. 2d 906, 908.

of national, rather than local significance. As one writer has stated, "This concept of the 'enlightened' voter has relevance for state and local elections, but * * * it is not germane to presidential elections."[6]

As to the first reason cited in justification of length-of-residence requirements—protection against fraud—Maryland's representatives in this litigation have not at any time attempted to show how the residence requirements in question serve this purpose. Indeed, as the District Court noted, as a result of the institution of this suit, the Attorney General of Maryland has recommended that these requirements be shortened for presidential elections. The position taken by the State, therefore, constitutes nothing less than an admission of the arbitrary and irrational nature of the provisions.

The State's interest in establishing a system of voter identification and preventing election fraud cannot be doubted. But the method utilized must be reasonably related to the achievement of the objective. Through other provisions of its election laws—the voter registration requirements (Anno. Code of Md., 1957 ed., Art. 33, Sec. 17, ff.)—Maryland has provided specific and detailed procedures for assuring itself of the identity and qualifications of those who present themselves to vote. Under those procedures persons who are eligible to vote, but have never done so in the State, are permitted to register up to *42 days* prior to a general election. *Id.* at Sec. 29. If a 42-day period between registration and election is sufficient time for the State to ascertain the voting eligibility of new registrants and to take other necessary steps to provide for orderly

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[6] *Schmidhauser, supra,* 61 Mich. L. Rev. at 828.

and non-fraudulent elections, it is evident that the one-year and six-month residence prerequisites are superfluous—at least to the extent that prevention of fraud is their objective.[7]

The inherent inconsistency between Maryland's one-year state residence requirement and the six-month county and city requirement further emphasizes their lack of rational basis as prerequisites for voting in presidential elections. Residence is a question of fact, partly determined by a person's state of mind, and no particular length of residence is necessary in order to prove the fact. But assuming that the indicia of residence are more readily discernible after a period of residence, there can be no justification for requiring a year of residence in the State if a six-month period in the county or city accomplishes the same objective. The inconsistency between these two time requirements is underscored by the fact that there is no provision under Maryland law for transferring a person's registration records from one county or city to another when he moves within the State. Hence, when

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[7] That shortened residence requirements are not inconsistent with assuring pure elections is shown by the fact that 16 states have adopted remedial legislation waiving existing length-of-residence provisions for presidential elections. Under those laws, new residents may be permitted to vote provided they apply for a ballot within a specified number of days prior to the election and otherwise possess the substantive qualifications necessary to vote in that state. As protection against possible fraud, such laws commonly provide that the application shall be in the form of an affidavit certifying that the applicant has not, and will not, vote in any other manner, and the appropriate state official is required to mail a duplicate of the application to the state in which the applicant last resided (Source: Constitutions and statutes of Arizona, California, Colorado, Connecticut, Idaho, Illinois, Kansas, Maine, Massachusetts, Missouri, Nebraska, New Jersey, New York, Ohio, Oregon, Wisconsin). See generally, 77 Harv. L. Rev. 574 (1964).

an individual makes an intrastate move from one county or city to another, he must wait a six-month period before he is eligible to register and vote. Yet the question of proof as to his new residence is identical to that presented by the case of a new resident in the State who has to wait a full year before becoming eligible.

In sum, it is seen that the residence requirements in question fail to stand the test of reason when applied to presidential elections. The discrimination which the requirements effect accordingly is revealed as irrational and invidious, and in contravention of the Fourteenth Amendment.

The District Court conceded the lack of justification for the periods of residence required under these provisions, particularly in view of the requirements of the Maryland election laws with respect to registration. It is no answer to say, though, as the District Court did in effect, that granting one's disagreement with the length of required residence, the problem is not of such proportions as to constitute unreasonable discrimination warranting judicial relief.[8] If it is not enough in a given year to disenfranchise 7 million potential voters through the operation of length-of-resi-

[8] The District Court, in reaching its decision relied on *McGowan* v. *Maryland*, 366 U.S. 420. That case is inapposite, however, for there the Sunday closing laws, as well as the exemptions which they contained were held by the Court to be reasonably related to the promotion of the health, safety and recreation of the State's citizens. Here, in contrast, as we have seen, there is no justification for the provisions in question in their application to presidential elections. Because these provisions bear no rational relation to the improvement of the presidential election process, they fail to meet the constitutional test. Cf. *Lassiter* v. *Northampton Election Board*, 360 U.S. 45, 51.

dence laws such as these, it need only be pointed out that this number is multiplied every four years with the advent of another presidential election. This Court in recent cases in which it has invoked the Fourteenth Amendment in protection of the individual's right to vote has shown its concern for relatively smaller numbers of citizens than those comprising the class disenfranchised by these provisions. E.g. *Carrington* v. *Rash, supra,* No. 82, this Term. As the Court has emphasized, "Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right." *Wesberry* v. *Sanders,* 376 U.S. 1, 17-18.[9]

Nor is the constitutionally protected right of appellants and others of the class they represent to vote in presidential elections subject to defeasance merely because 16 states have adopted special legislation shortening their residence requirements for presidential elections—nor because, as the District Court notes, Maryland might adopt such legislation. It is noteworthy that certain states have voluntarily recognized the unreasonableness of their voter residence requirements as they pertain to presidential elections, just as some states voluntarily reapportioned their legislatures without judicial intervention. But the fact that some states have recognized their constitutional responsibilities is no assurance that each of the states having residence requirements comparable to Maryland's will do so. For the Court to express itself on this important

[9] In *Pope* v. *Williams,* 193 U.S. 621, 633, which involved a challenge to Maryland's length-of-residence requirements, the Court expressly left open the question of the application of such provisions to presidential elections.

subject at the present time will give the states yet to act four years in which to incorporate shortened residence requirements into their presidential election procedures.

It is submitted that the District Court erred in dismissing the complaint. We believe that the question presented by this appeal is substantial and that it is of public importance.[10]

Respectfully submitted,

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[10] The fact that the 1964 presidential election has been held does not make this case moot. The provisions of law in question will "govern future elections." *Gray* v. *Sanders*, 372 U.S. 368, 375-376. This, together with "a public interest" in having the issue determined "militates against a mootness conclusion." *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632; *Division 1287, Amalgamated Assn., etc.* v. *Missouri*, 374 U.S. 74, 78.